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Rights and the Right to Know

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It is probably not too much of an exaggeration to say that the "right to know" is the leading rallying cry for contemporary American journalism. Indeed, this characterization is reinforced by the Code of Ethics of the Society of Professional Journalists, Sigma Delta Chi, which describes the public's right to know as "the overriding mission of the mass media," and urges that "journalists must be free of obligations to any interest other than the public's right to know."

Reliance on the right to know takes numerous forms. At times the right to know is claimed by a journalist who wishes special access to a prison, a courtroom, the scene of an accident, or government documents. At other times the right to know is used to justify the writing or publication of a news story that is arguably defamatory, or that may constitute an invasion of privacy. And the right to know is often, especially recently, relied upon as the primary right that generates the derivative right of the journalist to refuse to reveal confidential sources, or refuse to give evidence at a trial or before a grand jury.

One of the most intriguing features of this repeated reliance on the right to know is the fact that it, whatever it is, is characterized in terms of rights. This is more than a linguistic technicality. As soon as we couch an argument or a claim in the language of rights, we raise the stakes of moral, political, or legal discourse.[1] When we assert the existence of a right, and when we rely on that right, we implicitly maintain that it would be wrong to interfere with the exercise of that right, in a way that makes the claim substantially stronger and different in kind from a claim premised merely on an interest, a reason, a justification, or a policy.

In view of the importance we attach to rights, and in view of this special force of a claim of right, it seems especially appropriate to analyze carefully the right to know. Who possesses a right to know? Whom is it a right against? What is the source of the right? What subjects or activities does it encompass? What benefits or claims attach to being the holder of a right to know? What derivative or more specific rights does it generate? In what normative system - moral, political, or legal - does it reside? Is the right to know enforceable, and, if so, by whom, against whom, and how? In looking at these questions, I want to engage primarily in a process of conceptual analysis, a process that seems especially necessary with reference to the right to know. In the process I may insert occasionally some normative argument, but this is undoubtedly subservient to my primary aim of clearing up a considerable degree of conceptual confusion.

I

The standard distinctions between positive and negative freedom, or positive and negative liberty,[2] can, for purposes of exploring the right to know be translated into a distinction between positive rights and negative rights. Negative rights, similar to Hohfeldian privileges or liberties,[3] entitle the right-holder to be free from some form of external interference if and when he chooses to engage in the activity encompassed by the right. Many of the most common "human rights," as well as most American constitutional rights, are negative rights or liberties of this variety. Some of these rights, such as the rights to freedom of speech, or freedom of religion, or freedom to travel, relate to particular activities that might be pursued by the right-holder. Others, such as the right to be free from unreasonable searches and seizures, or the right to freedom from torture, relate to a more general right not to be interfered with in the normal pursuit of one's life. But regardless of minor variations, what characterizes all of these negative rights is that they require of government nothing other than non-interference with what the right-holder, using his own resources, chooses to do. These are negative rights because they require of the state only a negative--refraining from interference.

Positive rights, on the other hand, require something more than non-interference by the party under the correlative obligation. Positive rights require that something positive be done to or for the right-holder. The correlative obligation to perform this act may be placed on other individuals, but, in this context, it is much more likely to reside in government. The right to sustenance, or the right to shelter, for example, rights frequently mentioned in manifestos regarding human rights, are not merely claims to a right to non-interference. Those who advocate a right to sustenance are claiming much more than that the government should not take away the food that the citizen secures for himself. Rather, they advocate that the government take positive steps to provide food for the citizen. This notion of a correlative affirmative duty, rather than mere passive non-interference, also characterizes such claimed positive rights as the right to employment, the right to shelter, the right to medical treatment, and many others.

Once we understand this distinction between positive and negative rights, we can see that the right to know can conceivably be characterized as a negative right or as a positive right. But when characterized as a negative right, however, the notion of a right to know verges on the trivial. For as a negative right alone, the right to know would support little more than access to information that the citizen or journalist would otherwise be able to obtain using his own resources. The right to know in the negative sense would also support the absence of restrictions on the dissemination of information by willing speakers, writers, or publishers, and in this sense it

is of course not trivial.[4] But claims of rights can be trivial, or misleading, if in fact the claimed right adds nothing beyond what is already contained in some existing right.[5] Thus, the right to know in this sense is trivial if it adds little if anything to the standard liberty formulation of the rights to freedom of speech and freedom of the press. In this respect the right to know may be a shorthand expression for some of the standard consequentialist arguments for freedom of speech and freedom of the press, such as the argument that free speech leads to discovery of truth, and the argument that free speech is necessary for informed decisionmaking in a democratic society.[6] Because these and related arguments turn on the free flow of information, rather than on some particular benefit that accrues to the speaker, they can in one sense be described in terms of the right to know. Thus, to the extent that these or similar arguments focusing on the benefits free speech brings to listeners or to society in general are accepted, the right to know can be said to provide the underpinnings for free speech and free press rights of great strength. But the right to know in the negative sense still has little independent force in the sense of generating rights beyond those protected by rights already commonly acknowledged and enforced. This does not mean that knowledge is not important, or that the public's interest in knowing certain information is not important, but it is crucial to clarity in thinking about this issue that we distinguish the right to know as a background justification for the derivative and more specific liberty to speak and to write, on the one hand, from the right to know as having separate and independent force of its own.

More commonly, however, the right to know is characterized and claimed as a positive right. Here the claimant of the right to know is asking, or demanding, something more than mere non-interference. Rather, he is claiming that some person or government affirmatively provide something; in particular, information that the claimant would be unable to secure solely by his own devices. Even in this sense of a positive right, however, the right to know can take two forms. In the weak form the right to know is a claim of access to information that already exists. For example, the Freedom of Information Act, or any of the state analogues to this federal law, is a claim of access to certain documents and the like that have in fact been prepared for the government's purposes independently of any citizen's desire to see them. Similarly, the various state open meeting laws, or "sunshine" laws, provide access to a meeting that would take place even if no citizen had any interest whatsoever in attending.[7]

By contrast, the strong form of a positive right to know encompasses the requirement that certain information be provided regardless of whether that information otherwise exists in some transferable or tabulated form. For example, a demand that government provide reasons for its actions would be a demand for the creation rather than the mere transfer of

information, and thus would constitute a claim of the right to know in this strong sense.[8] So too, under some circumstances, would be a demand for public hearings where otherwise decisions would be made in private by a single decisionmaker.

The existence of the Freedom of Information Act and the various Sunshine Laws suggests that some facets of a right to know as a positive right requiring positive action by government already exist. In the sense of a legal right this is of course true. The right to know in the legal sense exists because of these laws. Given the existence of certain statutes, a legal right to know exists by definition, but that is quite different from saying that the right to know exists independently of or superior to these specific laws. That is, if there were no such laws, would the notion of a right to know support or at least provide an argument for the creation of laws like these; or would a right to know create judicially, politically, or morally enforceable rights even in the absence of a statute.[9] This is a much more difficult question, and one of the things that makes it more difficult is that the right to know here is a right of a rather different order than most other rights, at least those rights that are part of American political theory. For in the context of American political and legal institutions, we are accustomed to thinking of negative rights such as the right to free speech, and the right to free exercise of one's religion, and we are largely unfamiliar with positive rights. For example, there are no positive rights in the United States Constitution. Perhaps there should be,[10] and perhaps, as it has been argued,[11] the free speech and free press clauses of the First Amendment should be taken to support certain positive rights, but it must be recognized that this is a significant departure from the traditional conception of the role of rights in our particular system.

II

The right to know is most commonly characterized in terms of the public's right to know, and this suggests that any citizen possesses the right to know simply by virtue of being a citizen. Assuming this to be the case, whom is the right to know a right against? Who is encumbered with the correlative obligation that makes talk of rights meaningful?

Is the right to know, like many other rights, a right against other citizens? If this were the case, then claimants of a right to know are asserting that other citizens owe them an obligation to provide certain information. This is not a totally implausible claim, and indeed it is raised whenever a journalist employs the right to know as a justification for seeking information from people who may become involved in events of general public interest, such as crimes, natural disasters, or strokes of good fortune such as winning first

prize in a state lottery. But it seems difficult to accept the view that citizens have, as a correlative of the public's right to know, an obligation or a duty to provide to the public information about themselves. Such a conclusion might make sense if everything about us were to be treated as public property, and if we were to reject any value in privacy and in the citizen's decision to protect his autonomy by retaining control over information about himself. But these seem rather extreme claims. And if we do not wish to accept them, then we cannot say that a citizen has an obligation or a duty to provide information to the public absent some particularized need requiring special justification.[12] If, therefore, the correlative duty or obligation does not exist, then the public does not in fact have a right to know with respect to other members of the public. The public may wish to know, and the public may even have a legitimate interest in knowing, but in the absence of corresponding duty or obligation the public cannot be said to have a right to know with reference to other members of the public.

The foregoing argument applies with greatest force with respect to ordinary citizens who happen, fortuitously, to become involved in events of public interest. The argument is substantially weaker when applied to those who are, to use the terminology of the law of libel,[13] public figures. It is commonplace that certain people, by virtue of the role they play or the position they hold, have special obligations imposed upon them by that role or position.[14] Such positional obligations are held, for example, by physicians, by lawyers, by accountants, and by teachers. Perhaps, therefore, public figures have positional obligations to provide information about themselves to the public in a way that the ordinary citizen does not? The argument would take the form of a claim that public figures perform important public functions, and also receive certain benefits from public recognition. In exchange for what they receive from the public, or as part of the duties they have voluntarily assumed, therefore, public figures might be said to be under an obligation to expose their lives and practices to public scrutiny. This is not the appropriate time to explore the full details of this argument, nor the possible counterarguments that might be raised, but it is important to note that the argument, even in its strongest form, would seem to be limited to those individuals who voluntarily take on their particular public role, and who also receive a special public benefit from the assumption of that role. Absent both of these conditions, there seems little reason to impose upon a member of the public a special obligation to provide information about his life or his activities, for that seems to involve relinquishing the control over personal information that we properly consider a central feature of our autonomy.

Although necessary to establish the proper context, the previous discussion has been a bit of a digression, because the

right to know, in its most common and most plausible form, implies a correlative obligation not on the part of other citizens, but on the part of government. The argument is that the public has a right to know, as against government, about the workings and dealings of that government. As I have mentioned earlier, such a right now exists, at least in part, as a legal right, the Freedom of Information Act being the most prominent example. It is frequently argued as well that this form of a right to know is a constitutional right, in that the Constitution grants a right of affirmative access even in the absence of legislation.[15] With the exception of trials, however, the Supreme Court has repeatedly rejected such an interpretation of the Constitution,[16] and one of the reasons seems to be that this argued positive right fits at best uncomfortably in a document that is almost exclusively devoted to guaranteeing negative rights.

This is not the place to discuss the particular merits or demerits of particular Supreme Court cases and doctrines. But even the absence of a judicially recognized constitutional right does not mean that one cannot argue for the existence of a right to know, as against government, as a political right. What I mean by a political right is a right that is generated by the presuppositions of a political structure, and which attaches to those living within that structure.[17] The argument for the existence of such a political right would take the form of an argument from the underlying assumptions of majoritarian democracy. If public officials are in fact public servants, then it would make sense to say that all of their actions should be subject to scrutiny by their masters, the public at large.[18] One troublesome point, however, is that the very same argument would allow the same masters, in the exercise of their sovereignty, to determine that there was certain information they did not wish to have, or that their agents could best perform their tasks in an atmosphere of, if not darkness, then at least somewhat limited sunshine. This might not be the optimal policy for the majority to follow, but if the majority chooses, then it is difficult to see how an argument from democracy can deny that power. And if this is so, then the so-called political right to know may be no more than an interest in knowing, an interest that the majority, in the exercise of its sovereign powers, may at times choose to subjugate to other interests.

This suggests an additional problem. Even if this political right to know does exist, is it an absolute right, or, as it is commonly called, only a prima facie right?[19] If the right is absolute, this does not mean that it need cover every possible source of information. Rights may be absolute in strength, or degree of protection, while still being limited, perhaps even quite narrow, in scope, or coverage. But an absolute right, within its domain of coverage, cannot be overridden by other considerations. A prima facie right, on the other hand, is less than absolute even within its area of coverage. Within that area of coverage a prima facie right

generates a strong, preeumptive reason for following its mandates, which in this case would be the disclosure of information. But that presumption might well be overcome in a particular case by even stronger considerations militating against disclosure. In the context of the right to know, it seems difficult to say that this right could plausibly be absolute, even within a limited domain of coverage. Too many examples come to mind in which the right to know might be outweighed by particularly compelling circumstances. Governments have traditionally exaggerated claims of jeopardy to the national security, but that does not mean that there are not instances in which the national security might seriously be threatened by the public disclosure of information about weapons, troop movements, intelligence activities, and so on. There are also instances, outside of the national security realm, in which the lives and reputations of individuals might be threatened by too much disclosure. Does the public have a right to know the names of welfare recipients? What are the likely costs of the public's having a right to compelled disclosure of the names and whereabouts of undercover FBI agents investigating organized crime, or the American Nazi Party? The right to know, as against government, seems, at best, a right of great strength that can still be overridden by particularly exigent circumstances involving either enormous considerations of the general public interest, as in the national security cases, or threats to other rights, as where individual life, liberty, or perhaps reputation is at issue.[20] Even if there is a right to know, it hardly follows that it is the only right, or that it is necessarily stronger than all other rights.

III

With some of these distinctions in place, it is now possible to consider the extent, if at all, that journalists have some special role to play with reference to the right to know. More particularly, the primary question is whether the journalist has some special right <u>qua</u> journalist, one that is not shared by the general public but instead relates in some particular way to those who act as journalists.

It is of course quite possible that the public, and each and every member of it, has a right to know, but that journalists have no rights beyond those they enjoy merely as citizens. This is not to say that even in this case journalists might not have special reasons for exercising these rights with greater vigor and greater frequency than citizens who do not happen to be journalists, but that is quite different from saying that journalists have rights not enjoyed by all other members of the public should they wish to exercise them.

Thus, if there is a right to know, it by no means necessarily follows that it grants anything special to journalists.

Indeed, it seems quite justifiable to deny to journalists any special right to know beyond that arguably enjoyed by the public at large. First of all, it is a mistake to assume that all or even most dialogue about public affairs takes place in or through the mass media.[21] There is as much discussion of current events and matters of public concern in bars, in pool halls, in barber shops, and at dinner parties as anywhere else, and once we realize the extent of political discourse outside the mass media it can be seen that the journalist performs an important but by no means exclusive function in society. Moreover, there are substantial definitional problems involved in trying to determine who is to hold this argued special right. Are authors of books included along with reporters for newspapers, magazines, and the electronic media? If so, then what about the author of his first book, currently doing background research? These definitional problems are not, of course, insurmountable. We are accustomed to drawing lines even in the absence of hard and fast distinctions. But once we recognize that we may be drawing relatively arbitrary lines for the purpose of ease of interpretation and enforcement, we are engaged in a process that strikes more, to use Ronald Dworkin's terminology, of policy than of principle.[22] Thus, to the extent that we are forced to draw lines based primarily on convenience, it appears that we are talking at best about interests, and not about rights in any strong sense.

To the extent that journalists, however defined, <u>can</u> be said to have special rights to know beyond and distinct from those held by the general public, then these rights would seem to be premised on the role of the journalist as in some sense a <u>trustee</u> for the public at large. The public, the primary holder of the right to know under any plausible formulation, can be said under this theory to have specially entrusted some of these rights to journalists in order that the public can be better informed and the public interest be better served. Yet if under this theory the journalist is acting on behalf of the public, additional problems present themselves. If a journalist discovers information in his capacity as guardian of this special right to know, is he therefore <u>obligated</u> to provide that information to the public? Would it be possible for someone to "sue the <u>New York Times</u> for <u>not</u> publishing the Pentagon Papers"?[23] In other words, does the public have an enforceable right against the journalist to the release of any information discovered in the course of claiming or enforcing the public's right to know? Similarly, does the public have a right, again enforceable against the journalist, to have the journalist obtain information that the journalist might not wish to obtain? Or does the public have a right against the journalist to disclosure of information at a certain time, or in a certain way, as for example with enforceable standards of objectivity? I would expect that most journalists would recoil in horror at some of these suggestions, and indeed so do I. They are presented to demonstrate that there may be derivative rights that

attach to too strong a recognition of the view that the journalist performs a special function as trustee of the public's right to know.

Granting special rights to journalists may be said to justify imposing special responsibilities as well.[24] Common usage notwithstanding, it is of course true that there is no logical connection between rights and responsibilities in this sense. Neither logic nor language are affronted if we grant, create, or recognize rights in some person without at the same time imposing on that person any special duties, obligations, or responsibilities. The popular saying that rights carry responsibilities is not a matter of logical entailment. Many rights such as the right to free speech, are often exercised irresponsibly, and we expect that this will be the case.[25] But when we are talking about granting rights to certain classes of people beyond those rights held by the general public, the argument that responsibilities ought to be imposed as well becomes more compelling. Can the public require that those it entrusts with protecting and enforcing its right to know meet certain standards of training, knowledge, diligence, and objectivity? Can the public choose to create a mechanism for judicial enforcement of these responsibilities and obligations? Can special rights be withdrawn if the right-holder does not measure up to certain standards of performance?

Again, these suggestions sound quite uncomfortable, and I submit that one reason for this is that there is some tension between the role of journalist as trustee for the public's right to know, and more traditional conceptions of freedom of speech and freedom of the press. Apart from the question of whether objective reporting is even possible, many important goals are served by non-objective journalism, which we would normally call advocacy. The goals of public knowledge and involvement may be better served by the exchange of adversary positions than by everyone's disclaiming personal involvement and claiming to be objective and impartial. Whether this is true or not, at least it fits quite well with our traditional "marketplace of ideas" conception of freedom of speech and freedom of the press. I am uncomfortable with the notion that the New York Times, CBS News, or Time magazine should have rights greater than those enjoyed by The Daily Worker, the National Review, or the Village Voice, yet none of the latter list of publications would deny that they have a particular political or moral point of view. But I am equally uncomfortable with the idea that the National Review or The DailyWorker should be granted special rights because they are representing my interests or the interests of the public in general. But this is of course a false dilemma, created only if we assume that special rights for journalists must exist. We need not follow that course, and we can rely, as we have done in the past, on allowing journalists, for whatever their reasons, to use only those general rights available to all of us by virtue of our citizenship. By adopting that posi-

tion, we not only avoid some of the difficult line-drawing problems mentioned above, but we also avoid sacrificing much of the independence of the press to the illusory mandates of a right to know.

IV

In attempting to explore the terrain of the public's right to know, I have posed a large number of problems and questions, drawn probably too many distinctions, and provided very few answers. The message, and there is a message, however, is simple. When journalists, or we as members of the general public, claim a right to know, we are making a claim of special force. Asserting a claim of right, as opposed merely to alleging an interest, or sound policy, ought therefore to require especially strong justifications. To the extent that all interests or "goods" are couched in the language of rights, we dilute and therefore cheapen the notion of rights. Rights are important precisely because they trump the normal policy considerations we use in making most personal and governmental decisions. But if all of the suits are trump, we discover that we are playing at no trump. To avoid this, both the concept and languge of rights need to be reserved for those considerations that carry with them special and compelling moral or political justifications. The all too common move from "It is good to have x" to "There is a right to x" damages the very reason for recognizing rights at all. It may be that the special and compelling justifications necessary for recognizing the existence of a right are present in the case of the right to know, but establishing this will require greater attention to some of the distinctions discussed above than has traditionally been the case.

NOTES

1. See D. Lyons, "Utility and Rights," in J. Pennock and J. Chapman, eds., Ethics, Economics, and the Law (NOMOS XXIV) (New York: New York University Press, 1982), p. 107.

2. See generally I. Berlin, Two Concepts of Liberty (Oxford: Clarendon Press, 1961); J. Feinberg, Social Philosophy (Englewood Cliffs, New Jersey: Prentice Hall, Inc., 1973); G. MacCallum, Jr., "Negative and Positive Freedom," Philosophical Review, vol. 76 (1967), p. 318.

3. W.N. Hohfeld, Fundamental Legal Conceptions (New Haven: Yale University Press, 1964). For an overview of Hohfeldian analysis, see R.W.M. Dias, Jurisprudence (Fourth Edition) (London: Butterworth, 1976), pp. 33-65.

4. L. Tribe, American Constitutional Law (Mineola, New York: Foundation Press, 1978), pp. 674-76.

5. This point is dealt with at length in my Free Speech: A Philosophical Enquiry (Cambridge: Cambridge University Press, 1982), especially chapters 1, 4, and 5.

6. See Free Speech, op. cit. note 5, chapters 2, 3, and 6.

7. This is not to say, of course, that the nature of the meeting might not vary with whether it is open or closed, and the same applies to documents prepared with knowledge that they will be available to the public.

8. For example of such an argument, see M. Morgan, "The Constitutional Right to Know Why," Harvard Civil Rights - Civil Liberties Law Review, vol. 17 (1982), p. 297.

9. To say that moral and political rights, in contrast to legal rights, are enforceable at all may be somewhat peculiar, but whether we wish to call criticism of infringements of moral and political rights a system of enforcement is not germane to the theme of this essay.

10. For an argument that the Constitution can support positive welfare and related rights, see F. Michaelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment," Harvard Law Review, vol. 83 (1969), p. 7.

11. Interestingly, one of the most prominent arguments for positive rights as part of the First Amendment has been an argument for positive rights of access against the press. J. Barron, "Access to the Press - A New First Amendment Right," Harvard Law Review, vol. 80 (1967), p. 1641.

12. Although beyond my current agenda, I am thinking of governmental demands for information in the context of voting, drivers' licenses, conscription, etc.

13. See Curtis Publishing Co., v. Butts, 388 U.S. 130 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

14. On positional obligations, see A.J. Simmons, Moral Principles and Political Obligations (Princeton, New Jersey: Princeton University Press, 1979); C. Fried, Right and Wrong (Cambridge, Massachusetts: Harvard University Press, 1978).

15. See, for example, R. Bezanson, "The New Free Press Guarantee," Virginia Law Review, vol. 63 (1977), p. 731.

16. See Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Gannett Co. v. DePasquale, 443 U.S. 368 (1979). For largely historical reasons, the Supreme Court has recognized a general public right of access to trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

17. See R. Dworkin, Taking Rights Seriously (London: Duckworth, 1977).

18. See A.Meiklejohn, Free Speech and Its Relation to Self Government (New York: Harper & Brothers, 1948). For discussion and criticism of the Meiklejohn thesis, see my "Free Speech and the Argument From Democracy," in J. Pennock and J. Chapman, eds., Liberal Democracy (NOMOS XXV) (New York: New York University Press, 1983), p. 241.

19. For an overview of theories relating to absolute and prima facie rights, see J. Feinberg, op. cit. note 2, pp. 68-83; R. Martin & J. Nickel, "Recent Work on the Concept of Rights," American Philosophical Quarterly, vol. 17 (1980), p. 165.

20. The extent to which a non-absolute right can be overridden to protect another individual right is different from the extent to which a non-absolute right can be overridden to protect the public interest, even absent the existence of a countervailing individual right.

21. For a fuller discussion of this point, see my "Private Speech and the Private Forum," The Supreme Court Review (1979), p. 217.

22. R. Dworkin, op. cit. note 17, passim.

23. R. Dworkin, "Does the Public Have a Right to Know?" in U.S., Department of Health and Human Services, Ethics Advisory Board, Appendix: The Request of the National Institutes of Health for a Limited Exemption From the Freedom of Information Act, 1979, quoted in S. Bok, Secrets (New York: Pantheon Books, 1982), p. 255.

24. See W. Van Alstine, "The Hazards to the Press of Claiming a 'Preferred Positon,'" Hastings Law Journal, vol. 28 (1977), p. 761.

25. See my "Can Rights be Abused?" Philosophical Quarterly, vol. 31 (1981), p. 225.